No. 86-1659

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONTINENTAL CAN COMPANY,
Petitioner,

v.

ROBERT GAVALIK, *et al.*, and
ALBERT JAKUB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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60

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents submit this brief to demonstrate that the petition for writ of certiorari should be denied.

OPINIONS BELOW

The appendix to the petition does not include the district court's opinions resolving the exhaustion and statute of limitations issues. We have, accordingly, reprinted those opinions at pp. 12a-19a of the appendix to *this* brief. Additionally, as the court of appeals disposed of the exhaustion issue by declaring that its prior decision in *Zipf*

v. American Telephone and Telegraph Co., 799 F.2d 889 (3rd Cir. 1986), "clearly controls the resolution of Continental's exhaustion claim" (Pet. App. 30a), we have reprinted the *Zipf* opinion at pp. 1a-11a of the appendix to this brief. We cite to the appendix hereto as "Br. Opp. App. ——."

COUNTER-STATEMENT OF THE CASE

Congress enacted ERISA in 1974. While most of ERISA's provisions are addressed to protecting the interests of employees who have already become entitled to benefits under an employee benefit plan, Congress also included the quite distinct prohibition that appears in Section 510, 29 U.S.C. § 1140, *viz.*, that "it shall be unlawful for any person to discharge . . . or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

In 1976, Continental adopted a company-wide program to accomplish precisely what Section 510 forbids. Captioned in Continental's internal documents a "liability avoidance" program (Pet. App. 11a & n.12, 13a, 80a), the program's purpose was to prevent those employees who had not already qualified for certain pensions ("shutdown pensions") from ever qualifying for those pensions (*id.* 39a-43a, 46a-47a).[1] The essential elements of the program were these:

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[1] Continental's pension agreement provided that if a plant were permanently closed, affected employees would become entitled to immediate pensions if they met certain age and service combinations, even though they were too young to qualify for regular pensions. Continental anticipated that it would have to close a number of plants in ensuing years, and its "liability avoidance" program was designed to remove employees from the workforce before they had accumulated the age and service necessary to vest entitlement to those "shutdown pensions". (Pet. App. 8a-12a).

1. Through an elaborate computer study, Continental identified, at the plants with greatest potential pension liability, those employees whose combined age and service did not yet qualify them for shutdown pensions (*id.* 12a, 40a-41a).

2. A "cap" was placed on the size of the workforce at such plants, limiting the workforce almost exclusively to employees who *already* had qualified for shutdown pensions (*id.* 12a, 14a-15a).

3. All employees outside the cap were laid off from work, and were designated in the company's records (albeit they were not told this) "permanently laid off." An employee so designated was not to be recalled to work under any circumstances without the approval of top management at corporate headquarters (*id.* 12a-13a, 41a).

4. A "red flag" system was instituted to assure that employees designated "permanently laid off" would not inadvertently be recalled to work and thus allowed to qualify for shutdown pensions (*id.* at 13a, 41a).

5. Whereas prior to institution of this program plant managers had been instructed to adjust employment levels to whatever was necessary to accomplish the business available to the plant, plant managers were now instructed to adjust the volume of business at the plant to accommodate the cap on employment levels dictated by the "liability avoidance" program. Additional work, if it could not be accomplished by having already-qualified employees work overtime, was to be referred to other plants of the Company or contracted out. (*Id.* 13a, 41a, 78a-79a).

The instant lawsuit involves the Company's plant in Pittsburgh, Pennsylvania. That plant had one of the oldest workforces, and Continental envisioned that the plant might be closed sometime in the future. The Pittsburgh plant thus was one where the Company faced a large potential pension liability if employees not *yet* eligible for shutdown pensions continued working. Accord-

ingly, Pittsburgh was selected as one of three plants at which the liability avoidance program would be implemented first. A "cap" on employment was set for the plant; all outside the "cap," if not already on layoff, were laid off from work and were secretly designated "permanently laid off" to assure that they would not be recalled. (*Id.* 14a, 41a-43a.) Many employees were laid off just days or weeks short of the date that would have enabled them to qualify for shutdown pensions (*id.* 15a, n.17).

The Company had by design kept the existence of its liability avoidence program confidential, and secret from the employees and their union. (*Id.* 13a, 16a.) However, as the pattern of layoffs evolved over time, Pittsburgh employees suspected a pension-avoidance motive and instituted two lawsuits under § 510 that were consolidated for trial. In the course of discovery in these suits, plaintiffs unearthed extensive internal company documentation establishing the existence of the liability avoidance plan and its implementation at Pittsburgh. (*Id.* 16a.) A plaintiff class was certified, consisting of all who had been "permanently laid off" pursuant to the liability avoidance program. (*Id.* 67a-68a.) The lower courts' rulings pertinent to the petition for certiorari were as follows:

(1) *The Exhaustion Issue*

When suit was first filed, Continental moved to dismiss "for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement" (Br. Op. App. 13a). The district court denied the motion on three separate grounds: (1) the court found that the plaintiffs' complaint was not cognizable as a grievance under the Pension Agreement, and accordingly there was no pension procedure plaintiffs *could* exhaust (*id.*); (2) in any event, as a matter of law § 510 "has conferred on plaintiffs a statutory right independent of the collective bargaining agreement, which may be enforced in court independent of the grievance procedure" (*id.*

13a-14a); and (3) "[t]he questions presented by the plaintiffs' suit, involving as they do subtle questions of intent and state of mind, are better decided in court after a full discovery process and with the procedural safeguards provided by normal court procedures" (*id.* 14a-15a).

The court of appeals expressly affirmed the district court's finding that plaintiffs could not have processed their claims as grievances under the Pension Agreement (Pet. App. 29a). The court also affirmed the district court's conclusion that as a matter of law employees are not required to exhaust contractual remedies before instituting suit under § 510 (*id.* 30a-33a), declaring that conclusion controlled by its prior holding in *Zipf v. American Telephone and Telegraph Co.*, 799 F.2d 889 (3rd Cir. 1986) (Pet. App. 30a).

(2) *The Statute of Limitations*

Continental also moved to dismiss on the ground that the lawsuits were barred by the applicable statute of limitations. The district court denied this motion as well. Because ERISA does not specify a limitations period for § 510 actions, the court declared that "the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs" (Br. Opp. App. 18a). The court determined that the most analogous Pennsylvania statute was the six-year statute that applies, *inter alia*, to "an action charging employment discrimination" (*id.* 19a), and accordingly that the suit was timely filed (*id.*).

The court of appeals affirmed that the most analogous Pennsylvania statute of limitations is the six-year statute applicable to claims of employment discrimination, and that that is the time limit applicable to this case (Pet. App. 20a-23a). The court rejected Continental's arguments that the applicable time limit should be borrowed

from § 10(b) of the National Labor Relations Act (*id.* 23a-30a), or from that applicable to suits under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (*id.* 18a-20a & n.20).

(3) *The Merits*

Following a lengthy trial, the district court found that Continental in fact had adopted the liability avoidance program and implemented it at the Pittsburgh plant, and that Continental had been motivated, in laying off each member of the class, by a desire to prevent those employees from qualifying for shutdown pensions (Pet. App. 77a-80a, 86a, 90a). Nevertheless, the district court entered judgment for defendant, finding that Continental had also been motivated by declining business and that *plaintiffs* had failed to prove that they would not have been laid off even in the absence of the pension-avoidance motive (*id.* 49a, 61a-64a, 86a, 90a).

The court of appeals reversed, and remanded for further proceedings. The court found two fundamental errors in the district court's disposition of the merits.

First, the court of appeals reasoned that the district court's findings established that Continental had engaged in a classwide violation of § 510. The district court had found that Continental developed a program to make employment decisions based upon a statutorily forbidden criterion, and that Continental had implemented that program by taking the impermissible criterion into account "in making each of the challenged decisions that resulted in the layoffs of individual class members" (*id.* 43a). Citing and following *Teamsters v. United States*, 431 U.S. 324 (1977), the court of appeals held that Continental's program of discriminatory decision-making was a classwide violation that entitled the class to an injunction against the program's continued operation (Pet. App. 47a-48a).

Second, as to the employees' entitlement to individual relief, the court of appeals ruled that the district court

had erred by placing the burden on plaintiffs to prove that but for Continental's illegal motivation the plaintiffs would not have been laid off. The court of appeals here applied the two-stage methodology for employment discrimination class actions prescribed by this Court in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and in *Teamsters*. The existence of a classwide violation created a presumption that all to whom the illegal program was applied were victims entitled to individual relief (Pet. App. 58a-60a). The district court had already found that Continental had applied the illegal program to each of the class members in deciding to lay them off. Continental still could escape liability to an individual employee by showing that that employee would have been laid off at the same time even in the absence of the illegal motivation. But, the court of appeals ruled, the burden of proof on that "but for" issue was Continental's, and the district court had erred by placing it on plaintiffs. (*Id.* 61a-64a.) The court accordingly remanded the case for further proceedings in which Continental is to "be afforded the opportunity to present evidence that as to any particular individual class member's request for relief, that individual is not so entitled because in the absence of Continental's illegal plan that individual would have been without work at the same time in any event" (*id.* 65a). "Continental's burden on this issue will be one of persuasion" (*id.* 66a).

ARGUMENT

There is a conflict among the circuits as to whether employees are required to exhaust pension plan remedies before instituting suit under § 510 of ERISA. But that conflict is immaterial to the disposition of *this* case, because both lower courts held that in this case there were no pension plan remedies that plaintiffs *could* exhaust. Moreover, the circuit conflict may be temporal, and resolve itself without the need for this Court's intervention. In any event, as the non-exhaustion rule of the court below is consistent with six decisions of this Court holding exhaustion not required for claims that employees' statutory rights have been infringed, certiorari should more appropriately be reserved for a decision—if any recurs—that runs against the weight of this Court's decisions.

As to the other questions presented in the petition, there is not a single district or appellate court that has embraced the theories petitioner espouses, and the questions plainly do not merit this Court's attention.

I. THE EXHAUSTION ISSUE

The petition treats all ERISA suits as if they were an undifferentiated mass. It is important at the outset to focus the issue that is presented by petitioner's first question.

ERISA is a statute creating many discrete causes of action. Most ERISA suits to date have involved § 502 (a) (i) (B), 29 U.S.C. § 1132(a) (1) (B), which creates a cause of action by a participant in a benefit plan "to recover benefits due to him under the terms of his plan . . . ." Because that is a contractual cause of action whose resolution turns entirely on the construction of the plan, and because Congress mandated that every plan have a review procedure that "afford[s] a reasonable opportunity to any participant whose claim for benefits has

been denied for a full and fair review by the appropriate named [plan] fiduciary" (§ 503(2), 29 U.S.C. § 1133 (2)), the courts of appeals *uniformly* have held that plaintiffs must exhaust available review procedures under the plan before instituting such an action.[2]

The instant suit is not of this type. The plaintiffs do not contend that they are entitled to benefits under the plan, nor do they bring a cause of action whose resolution turns upon the meaning of the plan. Rather, they sue under § 510 of ERISA, alleging that their employer removed them from their jobs to prevent them from accumulating the service that might someday have enabled them to qualify for benefits under the plan.

The plan does not forbid the conduct alleged by plaintiffs here. Nor, perforce, does the plan provide any remedy for such conduct. Rather, § 510 itself creates the substantive prohibition which plaintiffs allege the employer has violated. Section 510 is similar in function to Title VII of the Civil Rights Act of 1964 and other statutes that forbid employment discrimination on specified grounds.

This Court, in six decisions, the most recent this Term, has held that employees need not exhaust contractual remedies before instituting suit alleging the violation of rights created by various statutes designed to provide minimum substantive guarantees to individual workers. As stated this Term in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, —— U.S. ——, 107 S.Ct. 1410 (1987):

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, *e.g.*, *McDonald v. West Branch*, 466 U.S. 284 (1984); *Barrentine v.*

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[2] That is the rule of the court below (Pet. App. 31a), and also of the Ninth Circuit which, like the court below, has held that claims of *statutory* violations, as distinguished from claims arising under the plan, need not be exhausted. *Amaro* v. *Continental Can Co.*, 724 F.2d 747, 751 (9th Cir. 1984).

Arkansas-Best Motor Freight System Inc., 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, at 737. [*Id.* at 1415.] [3]

The Third and Ninth Circuits, citing and following this line of Supreme Court decisions, have held that employees need not exhaust pension plan remedies before instituting suit alleging the violation of § 510 rights. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889 (3rd Cir. 1986). Because the Court below in the instant case declared its *Zipf* decision controlling, we have reprinted *Zipf* in the appendix to this brief (Br. Op. App. 1a-11a).

A circuit conflict exists, however, because, without citing these Supreme Court decisions or explaining why they are not applicable to § 510, the Seventh Circuit has held that district courts have discretion to require exhaustion of pension plan remedies, *Kross v. Western Eelctric Co., Inc.*, 701 F.2d 1238, 1243-45 (7th Cir. 1983); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 465-67 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987), and the Eleventh Circuit has held that available pension plan remedies *must* be exhausted before instituting a § 510 action, *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1224-27 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 863 (1986).[4]

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[3] In addition to the decisions cited in this passage, *see McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 268-70 (1958); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 354 (1971).

[4] The petition cites two other decisions as part of the conflict. *Alfarone v. Bernie Wolff Construction*, 788 F.2d 76 (2d Cir.), *cert.*

1. The circuit conflict is not material to the disposition of this case. The Seventh Circuit's rule would not have produced a different outcome in this case, because the district court here clearly manifested its view that exhaustion was not advisable in this case (Br. Opp. App. 14a-15a). And neither the Seventh nor the Eleventh Circuit's exhaustion requirements would be applicable to this case because there *were* no pension plan remedies that plaintiffs could invoke.

The district court in this case gave alternative, independent reasons for denying Continental's motion to dismiss for failure to exhaust. While holding that as a matter of law exhaustion is not required in § 510 cases (Br. Opp. App. 13a-14a), the district court also determined that there was no procedure under the Pension Agreement that plaintiffs *could* exhaust:

> Defendant has filed a motion to dismiss for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement between the defendant and the United Steelworkers of America, the collective bargaining agent of plaintiffs. Section 7 provides:
>
> > If, during the term of this Agreement, any differences shall arise between the Company and any employee who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences . . . may be taken up as a grievance . . . .
>
> [W]e do not believe that the plaintiffs' claim falls within the terms of the above-quoted provision since

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denied, 107 S. Ct. 316 (1986); *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980). Those decisions, however, did not involve claims under § 510, and thus did not address the issue presented here.

> they are, at this time at least, neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension. [*Id.* 13a.] [5]

Petitioner asserts that "the circuit court did not discuss the issue in its opinion" (Pet. 9 n.5). That is not correct. The court below expressly affirmed the district court's determination on this point (Pet. App. 29a):

> In ruling on Continental's motion to dismiss for failure to exhaust grievance procedures, the district court had occasion to consider the nature of appellants' claim and whether that claim was covered under the Pension Agreement. The court stated: "[W]e do not believe that the plaintiffs' claim falls within the terms of the [Pension Agreement] . . . since they are . . . neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." Jt. App. at 165. We agree with the district court's characterization of appellants' claims and its conclusion that such claims are not encompassed under the terms of the Pension Agreement.

Petitioner asserts that the district court's conclusion that plaintiffs' claim was not cognizable as a grievance under the Pension Agreement is "plainly erroneous" (Pet. 9 n.5). While that is not in any event an issue worthy of this Court's attention, the lower courts' reading of the Pension Agreement is plainly correct. Not only is the dispute mechanism limited in the respects those courts described, but the Agreement also states:

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[5] The provision quoted by the district court appears at Pet. App. 126a.

> [T]he arbitrator . . . shall have authority only to interpret and apply the provisions of this Agreement .... [Pet. App. 126a.]

As is evident, there was no pension procedure under which plaintiffs could assert their § 510 claim, and both courts below have so held. The circuit conflict on whether exhaustion is required thus is irrelevant to the disposition of this case, for no court requires the exhaustion of remedies that do not exist. The situation is not unlike that in *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972), where the Court granted certiorari to decide whether arbitral exhaustion of Fair Labor Standards Act claims was required, only to have to dismiss the writ as improvidently granted upon discovering that the dispute was not in any event arbitrable under the parties' agreement.[6]

Petitioner has sought to muddy the waters by suggesting that plaintiffs could have asserted their § 510 claim in the grievance procedure of the basic labor agreement (a separate agreement from the pension agreement) (Pet. 9 n.5). Neither court below discussed the question whether such a challenge could be maintained under the basic labor agreement's grievance procedure. That agreement defines a "grievance" as "any difference between the Local Management and the Union or employees *as to the interpretation or application of or compliance with this Agreement* respecting wages, hours, or conditions of employment" (Pet. App. 105a; emphasis added), and states that the arbitrator "shall not have jurisdiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement" (*id.* 112a). As in *Iowa Beef*

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[6] The issue not reached in *Iowa Beef Packers* was later decided in *Barrentine v. Arkansas-Best Motor Freight System Inc.*, 450 U.S. 728 (1981) (exhaustion of FLSA claims not required).

Packers, supra, the agreement does not authorize arbitration of statutory claims.

Moreover, even were the § 510 claim arbitrable under the basic labor agreement, that would be irrelevant to the circuit conflict that petitioner invokes. For the Seventh and Eleventh Circuits have mandated exhaustion only of review procedures under the pension agreement, and the rationale of their opinions would not stretch to mandating exhaustion under a separate labor agreement.

The Eleventh Circuit's holding in *Mason* was that "plaintiffs must exhaust their remedies *under the pension plan agreement* before they may bring their ERISA claims in federal court," 763 F.2d at 1227 (emphasis added). That requirement, the Eleventh Circuit reasoned, would "enhance the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently," "allow prior fully considered actions by pension plan trustees," and "be consistent with the intent of Congress that pension plans provide intrafund review procedures," *ibid.* None of those rationales would support requiring exhaustion of procedures that are not provided in the pension plan agreement but that exist under a separate labor agreement.

Similarly, the Seventh Circuit in *Kross* cited the same considerations, determining that "Congress intended fund trustees to have primary responsibility for claim processing" and that "[t]o make every claim dispute into a federal case would undermine the claim procedure contemplated by the Act," 701 F.2d at 1244 (quoting *Challenger v. Local Union No. 1 of Intern. Bridge*, 619 F.2d 645, 649 (7th Cir. 1980)).

No court has suggested that exhaustion is required of non-plan remedies, and the sole rationale the Seventh and Eleventh Circuits have proffered for exhaustion—a perceived congressional interest in allowing plan administrators to resolve disputes—is inapplicable to non-plan pro-

cedures. In the absence of that rationale, there would be nothing that even arguably distinguishes § 510 of ERISA from the other substantive statutes under which this Court consistently has held exhaustion is not required.

2. The circuit conflict would not warrant this Court's plenary review even if it were not irrelevant to the outcome of this case. This is so for two reasons:

First, the circuit conflict may well resolve itself without the need for intervention by this Court. The Seventh and Eleventh Circuit decisions do not mention, let alone give consideration to, this Court's unbroken line of decisions holding that exhaustion is not required under other statutes conferring minimum substantive employment protections on individual workers. See pp. 9-10, *supra*. Subsequent to the decisions of those circuits, this Court has issued its decision in *Buell*, synthesizing from its prior decisions "the theory . . . that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers'," 107 S.Ct. at 1415, quoting *Barrentine*, 450 U.S. at 737, and the Third Circuit has issued its decision in *Zipf* meticulously demonstrating that the Seventh and Eleventh Circuit decisions are inconsistent with this Court's rulings (Br. Opp. App. 4a-9a). District courts within and without those circuits have recognized the inconsistency between those circuits' rulings and this Court's decisions. See, *e.g.*, *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 1563 n.10 (N.D. Ind. 1986) ("[s]everal recent cases draw the continuing viability of *Kross* into doubt"); *Manser v. Missouri Farmers Ass'n, Inc.*, 652 F. Supp. 267, 272 (W.D. Mo. 1986) (*Kross* was based on a "flawed premise," as persuasively demonstrated in *Zipf*). In time, the Seventh and Eleventh Circuits may reverse these decisions which, as we show *infra* at pp. 16-18, are demonstrably incorrect.

The issue is not one that arises with such frequency that waiting would be inappropriate. In the 13 years since ERISA was enacted, the issue has been addressed by only four circuits. (Petitioner's effort to cloak the issue with apparent widespread importance is predicated upon lumping all "ERISA exhaustion" cases together—not separating § 510 claims from claims arising under the pension plan or under other provisions of ERISA; thus, most of the cases cited at Pet. App. 131a-134a are not § 510 cases.)

Second, even if the issue as to which a circuit conflict exists were presented in this case, and even if the Court were disposed not to wait to see if the conflict dissolves, we suggest that this would not be the case in which to address the conflict. The decision below (and *Zipf*, which controlled the decision below) are in full harmony with six decisions of this Court dealing with exhaustion under other substantive employment statutes. The decisions of the two circuits that have strayed from that course are the ones in need of correction. Certiorari ought to await a case in which a court of appeals has departed from the principles clearly established in this Court's opinions.

The decision below is plainly correct. On its face § 510 prescribes a lawsuit as the mechanism for enforcement. Any contention that this statute is distinguishable from all the others in which this Court has held exhaustion not required necessarily would have to be premised on evidence that Congress intended a different result here. But no such evidence exists.

Because the Seventh and Eleventh Circuits did not take account of this Court's pertinent decisions, they did not proffer an explanation as to why § 510 is distinguishable from the statutes as to which this Court has held exhaustion not required. They did, however, state that Congress' inclusion of § 503 in ERISA, 29 U.S.C. § 1133, requiring a dispute mechanism in the plan, signified a

preference for dispute resolution in the first instance by plan administrators. Section 503 provides:

> § 1133. Claims procedure
>
> In accordance with regulations of the Secretary, every employee benefit plan shall—
>
> (1) provide adequate notice in writing to any participant or beneficiary *whose claim for benefits under the plan has been denied*, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant *whose claim for benefits has been denied* for a full and fair review by the appropriate named fiduciary of the decision denying the claim. [Pet. App. 100a, emphasis added.]

As the Third Circuit pointed out in *Zipf:*

> The provision relating to internal claims and appeals procedures, Section 503, refers only to procedures for claims for *benefits*. There is no suggestion that Congress meant for these internal remedial procedures to embrace Section 510 claims based on violations of ERISA's substantive guarantees. [Br. Opp. App. 5a-6a, emphasis in opinion.]

The enactment of § 503 thus is no indicator that Congress intended to depart from the norm and require exhaustion of § 510 claims. Petitioner does not contend otherwise in the petition.

Petitioner *does* contend, however, that the legislative debates indicate an intention that there be exhaustion of § 510 claims (Pet. 12-14). But, at the Third Circuit demonstrated in *Zipf*, those debates suggest precisely the opposite (Br. Opp. App. 6a).

Senator Hartke inquired of Senator Javits, one of the bill's principal sponsors:

> MR. HARTKE. . . . Let me ask what administrative procedures are available to the employee. *Does he not have to go to court?*
>
> MR. JAVITS. *Yes*; but heretofore he had no remedy at all. I know the Senator was one of the most forceful advocates of this right to go to court on the basis of race or sex discrimination. *This gives the employee the same right.* [2 Legislative History of the Employee Retirement Income Security Act of 1974, 1641-42 (1976) (emphasis added); hereinafter "Leg. Hist.".] [7]

Beyond this exchange, the only reference in the legislative history to administrative or arbitral remedies for § 510 claims was contained in an amendment proposed by Senator Hartke. Senator Hartke fully understood that the bill as drafted required court actions for enforcement of § 510. 2 Leg. Hist. 1775, 1837. His proposed amendment would have substituted an administrative remedy for court actions, the administrative remedy consisting of arbitration where an arbitration clause encompassed the dispute. 2 Leg. Hist. 1774-75, 1835-36. The amendment was rejected by voice vote, 2 Leg. Hist. 1838, and the Conference Report stated that § 510 rights were to be enforced by "a civil action." H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 330 (1974), reprinted at 3 Leg. Hist. 4597.

The Third Circuit was surely right in concluding, in *Zipf*, that this legislative history does not warrant a departure from the norm established by this Court's prior decisions, *i.e.*, that exhaustion is not required of claims that substantive rights conferred on individual workers by statute have been violated. (Br. Opp. App. 5a-6a). Indeed, were the Court disposed to reach the

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[7] The "right" given a victim of race or sex discrimination is, of course, a right to sue without exhausting administrative remedies. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

issue in this case, we submit that summary affirmance would be in order.

II. THE OTHER ISSUES

The remaining issues are plainly unworthy of this Court's time and attention. Accordingly, even if the Court were disposed to grant certiorari on the first issue, it should limit the grant to that one issue lest the parties and the Court be subjected to litigation of issues that do not deserve this Court's plenary attention.

A. The Statute of Limitations

The petition proffers novel approaches for determining the statute of limitations in § 510 actions that have not been embraced by a single district or appellate court and that have nothing to commend them.

First, invoking this Court's decision in *Del Costello v. Teamsters*, 462 U.S. 151 (1983), petitioner contends that the six-month time limit of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should control actions brought under § 510 of ERISA. *Del Costello*, of course, was not an ERISA case. And the Court was careful in *Del Costello* to emphasize the limit of its holding:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, *in labor law or elsewhere*. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy . . . . On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet *resort to state law remains the norm for borrowing of limitations periods*. [*Id.* at 171; emphasis added.]

The court below, in conformity with every decision to date, looked to state law to borrow the limitations period for actions under § 510 of ERISA.

Second, equally far afield is petitioner's alternative contention that the time limit for § 510 actions should be the same as the selected for actions under 42 U.S.C. § 1983 in light of *Wilson v. Garcia*, 471 U.S. 261 (1985). Again, no court has so held, and as the court below cogently demonstrated (Pet. App. 18a-21a), the argument makes no sense.

Third, petitioner contends that the court below erred in determining which Pennsylvania limitations statute is applicable to claims of employment discrimination. But this Court surely has no interest in examining a question of state law as to which the district court and court of appeals—all Pennsylvanians—were in unanimity. See, *e.g.*, *Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Pembaur v. City of Cincinnati*, —— U.S. ——, 106 S.Ct. 1292, 1301 & n.13 (1986), and cases cited therein.[8]

B. The "But For" Issue

The court of appeals' disposition of the merits is in exact conformity with this Court's decisions in *Franks* and *Teamsters*, and presents no issue warranting this Court's attention. This Court held in *Teamsters* that plaintiffs in a class action establish a classwide violation by proving that the employer has pursued "a policy of discriminatory decisionmaking," 431 U.S. at 362, *i.e.*, by proving that "a [discriminatory] policy existed," *id.* at 360. See also, *Franks*, 424 U.S. at 772. The district court had found precisely that here. And that proof "[w]ithout any further evidence . . . justifies an award of prospective relief" which "might take the form of an injunctive order against

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[8] Respondents have contended throughout that, whatever time limit might be applicable, Continental's deliberate concealment of the existence of its liability avoidance program (including concealment of the fact that employees had been designated "permanently laid off") meant either that the cause of action did not accrue or that the time limit was tolled. The lower courts had no need or occasion to address that contention.

continuation of the discriminatory practice." *Teamsters*, 431 U.S. at 361.

The court below recognized that proof of the classwide violation did not automatically entitle the laid off employees to make-whole relief. Rather, the court adhered faithfully to *Franks* and *Teamsters*, which held that proof of the classwide violation "supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy," *Teamsters*, 431 U.S. at 362, and that the burden of persuasion accordingly shifts to the defendant "to prove that individuals . . . were not in fact victims" of the discriminatory policy, *Franks*, 424 U.S. at 772. See also, *id.* at 773 n.32; *Teamsters*, 431 U.S. at 362. As Continental contended that the individuals would have suffered layoff at the same times even had it not taken pension-avoidance into account in making its employment decisions, the case was remanded to afford Continental the opportunity to prove that claim. The district court was reversed because, in contravention of *Franks* and *Teamsters*, it had placed the burden on *plaintiffs* to prove that they would *not* have been laid off in the absence of the discriminatory policy.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 85-3420

MONICA M. ZIPF,

Appellant,

v.

AMERICAN TELEPHONE AND TELEGRAPH CO.

Argued June 2, 1986

Decided Aug. 27, 1986

Before GIBBONS, BECKER, and STAPLETON, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge.

In this appeal we are called upon to decide whether a participant in a federally regulated employee benefits plan must exhaust internal administrative remedies before filing suit in federal court for alleged interference with her statutory rights. We find that no exhaustion is required, and so reverse the judgment of the district court.

I

Monica M. Zipf, appellant, was employed by the American Telephone & Telegraph Company, appellee ("AT & T"), from March 21, 1969 until April 5, 1984. In 1981, Zipf was diagnosed as suffering from rheumatoid ar-

thritis. This illness, and its episodic "flare-ups," occasionally caused Zipf's absence from work. Her medical condition led to her taking a disability leave of absence from her employment, beginning on September 27, 1982. She remained on disability leave, which included a period of maternity leave, until, with the permission of her physician, she returned to work in July 1983. Zipf received disability benefits under the terms of AT & T's Sickness and Accident Disability Benefit Plan ("the plan") for at least part of this period.

After Zipf's return to full-time status, she continued occasionally to miss work on account of her illness. On Friday, March 30, 1984, Zipf's rheumatoid arthritis became aggravated and she began a period of absence that continued until the final day of her employment, Wednesday, April 5, 1984. On that day, Zipf's supervisor visited her at home and informed her that a decision had been made to terminate her because of her "excessive absenteeism."

Zipf alleges that under the terms of AT & T's plan, she would have been entitled to disability benefits beginning on the eighth calendar day of absence from work. As an employee with more than fifteen years of service with AT & T, she was potentially eligible for substantial benefits, in an amount equal to her full rate of pay for up to 26 weeks and at half pay for the following 26 weeks. Moreover, if her disability had thereafter continued to prevent her return to work, she then might have been able to obtain benefits under AT & T's Long Term Disability Plan.

Zipf's eighth day of absence from work as a result of illness would have been April 6, 1984. Zipf asserts that she was terminated on the seventh calendar day of absence, April 5, 1984, to prevent her from potentially qualifying for the substantial benefits for which she would have become eligible on April 6 and to eliminate a "disability problem." Zipf filed a complaint against

AT & T in the district court, alleging that she had been fired in violation of state law and Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140, the provision of that Act which protects employees from interference with their statutory and plan rights. Zipf sought reinstatement, backpay, and other equitable restitution.

Following discovery, AT & T moved for summary judgment. It argued that Zipf failed to exhaust the internal administrative remedies made available by the plan and that she should not be permitted to bring this suit until she has done so. Second, AT & T asserted that, because there are no genuine issues of material fact, it was entitled to summary judgment as a matter of law.

The district court granted summary judgment to AT & T on its exhaustion theory, without reaching the company's alternative ground, and dismissed the Section 510 claim without prejudice. The court also dismissed Zipf's pendent state law claim as preempted by ERISA. Zipf has appealed the district court's ruling that the failure to exhaust administrative remedies barred her Section 510 suit. She has not appealed the dismissal of her pendent state claim for wrongful discharge.

The parties agree that Zipf was a participant in the Sickness and Accident Disability Benefit Plan, a plan subject to ERISA. As mandated by ERISA Section 503, 29 U.S.C. § 1133, the plan includes claims and appeals procedures which give participants certain rights regarding the determination of eligibility for disability benefits.[1] AT & T admits that this plan provides disability

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[1] The plan summary states that employees have the "right under ERISA and the Disability Benefit Plan to file a written claim for payment of benefits under the Plan. . . . If a claim for benefits is denied in whole or in part, the claimant . . . may appeal this denial. . . ." The plan does not expressly require internal exhaustion nor does it assert that the appeal procedure is an employee's exclusive remedy. The plan summary states "No one, including your

benefits beginning on the eighth day of a disability only "so long as said employee remain[s] an employee for that eight (8) day period," a condition that Zipf did not satisfy. Zipf did not seek benefits under the plan before bringing this action.

II

Zipf's federal claim is based upon Section 510 of ERISA which provides:

> [It is unlawful] for any person to discharge . . . or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. . . . 29 U.S.C. § 1140.

Congress enacted this section to prevent unscrupulous employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based rights. *West v. Butler*, 621 F.2d 240, 244-26 (6th Cir.1980). This was done "in order to completely secure the rights and expectations brought into being by this landmark reform legislation." S.Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4872.

This case presents two distinct exhaustion issues. The first is whether Zipf, before seeking judicial relief on her Section 510 claim, was required to submit that claim to the plan. In similar situations, the Seventh and Eleventh Circuits have held that such a submission to the plan should normally be required. *Kross v. Western Electric*

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employer, . . . may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA. . . . If you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in Federal Court."

Co., 701 F.2d 1238 (7th Cir.1983) (affirming a district court decision requiring employee first to present his claim of discrimination to the plan); *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir.1985), *cert. denied* —— U.S. ——, 106 S.Ct. 863, 88 L.Ed.2d 902 (1986) (claims grounded in statutory provisions of ERISA should be required first to be brought through plan's appeals procedures). The Ninth Circuit has reached a contrary conclusion. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir.1984) (claim arising from alleged breach of ERISA Section 510 not subject to exhaustion requirement). The second issue is whether Zipf, before seeking judicial relief on her Section 510 claim, must submit to the plan the question of whether she would have been eligible for benefits had she not been discharged.

The district court in this case resolved the first issue in favor of requiring exhaustion, relying primarily on our decision in *Wolf v. National Shopmen*, 728 F.2d 182, 185 (3d Cir.1984). We disagree with the district court's reading of that case. In *Wolf*, we held that a party bringing an action under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to enforce or clarify the terms of a benefit plan, must exhaust administrative remedies. *Wolf* does not govern actions, such as Zipf's, which are premised on Section 502(a)(3), 29 U.S.C. § 1132(a)(3) and are brought not to enforce the terms of a plan, but to assert rights granted by the federal statute.

We decline AT & T's invitation to find in ERISA an implied exhaustion requirement applicable to substantive rights conferred by that Act. First, we find no indication in the Act or its legislative history that Congress intended to condition a plaintiff's ability to redress a statutory violation in federal court upon the exhaustion of internal remedies. The provision relating to internal claims and appeals procedures, Section 503, refers only

to procedures regarding claims for *benefits*.[2] There is no suggestion that Congress meant for these internal remedial procedures to embrace Section 510 claims based on violations of ERISA's substantive guarantees.

On the contrary, the legislative history suggests that the remedy for Section 510 discrimination was intended to be provided by the courts. 2 *Legislative History of the Employee Retirement Income Security Act of 1974*, 1641-42 (1976) (remarks of Sens. Hartke and Javits).[3] Indeed, an amendment that would have created an administrative remedy for Section 510 claims, to be established by the Department of Labor, was defeated. *See id.*, at 1774-75, 1835-37.[4]

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[2] 29 U.S.C. § 1133, Section 503, reads:

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

[3] Sen. Hartke. "Let me ask what administrative procedures are available to the employee [who raises a Section 510 claim]. Does he not have to go to court?

Sen. Javits: "Yes; but heretofore he had no remedy at all. I know the Senator was one of the forceful advocates of this right to go to court on the basis of race or sex discrimination. This gives the employee the same right."

2 Legislative History at 1641-42.

[4] The legislative history upon which *Mason*, 763 F.2d at 1227 and *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980), relied, while supporting the proposition that exhaustion should apply where a claimant seeks benefits, does not indicate a congressional intent that exhaustion of statutory claims be required.

Moreover, we believe this court has heretofore rejected the underlying premise of AT & T's argument in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir.1985). In *Barrowclough*, while recognizing the strong national policy favoring arbitration, we held that suits alleging violation of substantive rights conferred by ERISA can be brought in a federal court notwithstanding an agreement to arbitrate. We there observed:

> With the enactment of ERISA, we must now accommodate its policy of providing federal court access and federal law remedies to pension claimants and their beneficiaries with the federal policy favoring enforcement of arbitral agreements embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1-13 (1982).
>
> We conclude the most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, (citations omitted) while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate. (citations omitted) Under the distinction we make between statutory and contractual claims, ERISA neither completely supplants nor is completely subordinate to arbitration. . . .

752 F.2d at 939.

Thus, in *Barrowclough*, we "drew a distinction . . . between claims based on pension rights created by contract, which must be arbitrated [where the parties have so agreed], and claims based on purely statutory rights created by ERISA, which may be asserted in federal court directly." *DelGrosso v. Spang & Co.*, 769 F.2d 928,

932 (3d Cir.1985), *cert. denied* —— U.S. ——, 106 S.Ct. 2246, 90 L.Ed.2d 692 (1986). When a plan participant claims that he or she has unjustly been denied benefits, it is appropriate to require participants first to address their complaints to the fiduciaries to whom Congress, in Section 503, assigned the primary responsibility for evaluating claims for benefits. This ensures that the appeals procedures mandated by Congress will be employed, permits officials of benefit plans to meet the responsibilities properly entrusted to them, encourages the consistent treatment of claims for benefits, minimizes the costs and delays of claim settlement in a non-adversarial setting, and creates a record of the plan's rationales for denial of the claim. *See Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984); *Grossmuller v. International Union*, 715 F.2d 853, 856-57 (3d Cir.1983); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir.1980); *see also Barrowclough*, 752 F.2d at 939.

However, when the claimant's position is that his or her federal rights guaranteed by ERISA have been violated, these considerations are simply inapposite. Unlike a claim for benefits brought pursuant to a benefits plan, a Section 510 claim asserts a statutory right which plan fiduciaries have no expertise in interpreting. Accordingly, one of the primary justifications for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent. Indeed, there is a strong interest in judicial resolution of these claims, for the purpose of providing a consistent source of law to help plan fiduciaries and participants predict the legality of proposed actions. Moreover, statutory interpretation is not only the obligation of the courts, it is a matter within their peculiar expertise. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 94 S.Ct. 1011, 1024, 39 L.Ed.2d 147 (1974).

These considerations, together with Supreme Court precedent pertaining to analogous statutory schemes,[5] supported the balance which we struck in *Barrowclough*. Each of these considerations and each of the cases relied upon in that case provide the same counsel here. Because we perceive no basis for striking a different balance in this context, we hold that an employee with a claim under Section 510 of ERISA need not submit that claim to the plan before seeking relief in a federal district court.

Nor are we persuaded by AT & T's alternative argument that Zipf at least should be required to submit to the plan the issue of whether she would have been eligible for benefits had she not been discharged. While plan fiduciaries, as we have noted, are particularly qualified to resolve issues of eligibility, we perceive no legitimate basis for requiring Zipf to petition them before pursuing her judicial remedy.

Zipf is making no claim for benefits and concedes that she is not entitled to disability payments. Under these circumstances there is simply no reason to believe that the plan fiduciaries will resolve the hypothetical issue of whether she would have been entitled to benefits had she not been discharged.

Moreover, contrary to AT & T's suggestion, a resolution of this hypothetical issue by the plan fiduciaries

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[5] *See e.g., McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (failure to prevail in arbitration cannot foreclose lawsuit based on same facts brought under 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (exhaustion of arbitration not a prerequisite to suit to enforce statutory rights under Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (claim of race discrimination under Title VII not foreclosed by plaintiff's failure to prevail on the same claim brought under binding arbitration).

would neither "focus the issues" in Zipf's Section 510 suit nor otherwise materially aid the district judge in that suit. Section 510 itself indicates that the employee need not show that "but for" the unlawful interference, the employee would have been entitled to benefits. The statutory language forbids conduct taken for "the purpose of interfering with the attainment of any right to which such participant *may* become entitled," regardless of whether the interference is successful and regardless of whether the participant would actually have received the benefits absent the interference. Thus, Section 510 does not require Zipf to demonstrate that she would have been entitled to benefits on April 6, or at any other specific time.

It is, of course, true that the employee in a Section 510 suit needs to establish that, at the time of the alleged violation, he or she had the potential of receiving benefits. Otherwise, there can be no credible claim that the employer's discharge or harassment decision was motivated by a desire to prevent the employee from receiving his or her due. Nevertheless, cases in which the existence of such a potential is contested will be rare, and we think it unlikely that, resolution of that issue, when contested, will present complex issues of plan interpretation, a matter reserved for the plan trustees in the first issue. *See Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir.1984). While we cannot rule out the possibility of a Section 510 suit which presents a substantial issue of plan interpretation, that possibility does not justify an across-the-board barrier to judicial relief.[6]

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[6] We acknowledge that cases may arise in which a Section 510 claim is so closely intertwined with a serious issue requiring interpretation of a benefit plan that a trial court could properly stay the statutory action pending resolution of the issue by the plan fiduciaries. *See Amaro*, 724 F.2d at 752-53 (suggesting that a trial court can stay a statutory claim that arises out of same facts presented

For these reasons, we hold that Zipf is not required first to exhaust her benefit plan's internal procedures before bringing her claim that her employer fired her to prevent her from obtaining disability benefits.

III

* * *

[The Court here dealt with an unrelated issue]

IV

For the reasons stated above, this court will reverse the judgment of the district court and remand the case for proceedings consistent with this opinion.

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in an ongoing administrative or arbitral proceeding). We are not confronted with such a case, however, and we express no opinion with respect to the approach suggested in *Amaro*.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,
Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,
Defendant.

MEMORANDUM OPINION

BLOCH, District J.

This action charges that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Continental Can awards a pension to employees who have attained 20 years of continuous service and whose age and years of service total at least 65 and less than 75. Specifically, the complaint alleges that the defendant closed a division of its West Mifflin plant so as to lay the plaintiffs off prior to their 20 years of service. Furthermore, the complaint alleges that the defendant continued thereafter to meet its production needs by working its employees overtime, rather than calling plaintiffs back.

This action is brought pursuant to § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140, which provides, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefits plan]."

Defendant has filed a motion to dismiss for plaintiffs' failure to exhaust the grievance procedure set forth in Section 7 of the Pension Agreement between the defendant and the United Steelworkers of America, the collecti[ve] bargaining agent of plaintiffs. Section 7 provides:

> "If, during the terms of this Agreement, any differences shall arise between the Company and any employee who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences . . . may be taken up as a grievance. . . ."

First, we do not believe that the plaintiffs' claim falls within the terms of the above-quoted provision since they are, at this time at least, neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension. Second, and perhaps more importantly, we believe that § 510 of ERISA has conferred on plaintiffs a statutory right independent of the collective bargaining agreement, which may be enforced in court independent of the grievance procedure.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973), the Supreme Court held that an individual's right to equal employment opportunity under Title VII was independent of an employee's non-discrimination rights under a collective bargaining agreement, and that an employee's initial resort to the grievance procedure did not preclude a later court action. The Court noted the drawbacks to submitting a statutory dispute to arbitration. These included the fact that an arbitrator is an expert in "the law of the shop, rather than the law of

the land," *id.* at 57. Furthermore, arbitrable fact finding is not usually equivalent to judicial fact finding; the rules of evidence usually do not apply; the record of the arbitration proceedings is not complete; and discovery compulsory process, cross-examination, and testimony under oath are often limited or unavailable.

Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, —— U.S. ——, 101 S.Ct. 1437 (1981), the Court concluded that an employee's right to minimum wages under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, was independent of his right to collectively-bargained for wages. Thus, a Court can entertain an independent action pursuant to the FLSA, even after a grievance has been filed and processed. The Court noted:

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

Like the minimum wage provisions of the FLSA, we find ERISA's guarantee that an employee shall not be discriminated against in order to deprive him of his pension rights to be a minimum substantive guarantee to individual workers enforceable in a court of law. *Scheider v. United States Steel Corporation*, 486 F. Supp. 211 (W.D. Pa. 1980), relied upon by the defendant, is not to the contrary. *Scheider* was not brought to secure rights protected by § 510 of ERISA but to secure rights protected by a pension plan.

The questions presented by the plaintiffs' suit, involving as they do subtle questions of intent and state of

mind, are better decided in court after a full discovery process and with the procedural safeguards provided by normal court procedures. For these reasons, the defendant's motion to dismiss is denied and its motion to stay discovery pending decision of the motion to dismiss is moot.

An appropriate Order will be issued.

Date: 3/26/82

/s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

ORDER

AND NOW, this 26th day of March, 1982, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on March 4, 1982,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,
Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,
Defendant.

Civil Action No. 82-1995

ALBERT J. JAKUB, *et al.*, on behalf of themselves and others similarly situated,
Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,
Defendant.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs allege in these consolidated cases that the defendant manipulated plaintiffs' length of employment in order to deprive them of certain pension benefits. Specifically, the parties' collective bargaining agreement provides for the payment of an "early pension"—referred to as the Rule of 65 and 70/75 Plans—in the event of a plant shutdown or permanent layoff. Only those employees who have the 20 years of experience necessary under the Rule of 65 Plan and the 15 years of experience necessary under the 70/75 Plan, combined

with an age factor, are eligible for the benefits. Plaintiffs complain that the defendant closed a division of its West Mifflin plant for the purpose of laying off plaintiffs prior to their entitlement to these benefits. Furthermore, the plaintiffs contend that the defendant continued to meet its production needs thereafter by working its employees overtime to avoid calling the plaintiffs back to work.

This action is brought pursuant to § 510 of the Employment Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. § 1140, which provides that "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan.]" The defendant filed motions to dismiss on March 8, 1983, and June 15, 1983, in Civil Action No. 82-1995, which this Court will deny.

In its motion filed on March 8, 1983, the defendant seeks dismissal on various grounds. The first asserted basis for dismissal is that the complaint fails to state a cause of action because the Rule 65 and 70/75 Plans do not fall within 29 U.S.C. § 1140. Without doubt, these plans do fall within the statutory definition of "employee benefit plan." 29 U.S.C. § 1002(3). *See also Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1241-43 (7th Cir. 1983).

Defendant's second basis for moving for dismissal is that the complaint fails to state a cause of action because ERISA does not preclude consideration of operating costs, including pensions, in the management of a business. This statement of the issue does not accurately reflect the complaint. Plaintiffs are asserting that defendant deliberately followed a plan for avoiding pension liability as a means of increasing its profits, not that it deliberately

increased plant profitability by a means that happened to effect employees' eligibility for pension benefits. The former conduct is a violation of ERISA; the latter conduct is not charged by the plaintiffs.

For its next ground for dismissal, defendant raises the plaintiffs' failure to exhaust their remedies. This contention has been previously rejected by this Court in its opinion in Civil Action No. 81-1519, which has since been consolidated with this case. This Court recognizes that the Seventh Circuit subsequently reached the opposite result in *Kross v. Western Electric Co., Inc.*, 710 F.2d 1238, 1243-45 (1983). Also this Court is well aware of the Third Circuit's frequent admonitions that "[i]f there is any expression of public policy pertaining to labor-management relations that has emerged loud and clear in today's jurisprudence it is the national policy favoring arbitration of labor disputes." However, after a thorough review of the opinion in Civil Action No. 81-1519, the *Kross* decision, and Third Circuit law on the arbitrability of labor disputes, this Court reffirms its decision in Civil Action No. 81-1519 and holds it applicable to its companion case, Civil Action No. 82-1995.

The final ground for dismissal asserted in the first motion is that this action is barred by the statute of limitations. Both parties agree that 29 U.S.C. § 1132 and § 1140 do not provide a specific limitations period and that the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs. Defendant first argues that the Supreme Court decision of *DelCostello v. International Brotherhood of Teamsters*, —— U.S. ——, 51 U.S.L.W. 4693 (June 8, 1983) mandates the application of a six-month statute of limitation. Since *DelCostello* dealt with the statutory limitation to be applied to actions filed after binding arbitration, it is wholly inapplicable to this case. Defendant's next contention is that the two-year statute of limitations which

governs actions for intentional interference with contractual relations is most analogous to this action. This Court disagrees, concluding that the cause of action alleged by plaintiffs is most analogous either to an action charging employment discrimination or a suit alleging breach of a fiduciary duty, both of which are subject to the 6-year residuary period of limitations set forth in 42 Pa.C.S.A. § 5527(6). *See Knoll v. Springfield Township School District*, 699 F.2d 137, 145 (3d Cir. 1983) (appeal pending); *Weisen v. Reichett*, —— F. Supp. ——, 111 LLRM 3136 (W.D. Pa. 1982).

The plaintiffs filed suit on September 27, 1982, alleging that discriminatory layoffs of defendant's employees to avoid pension liabilities began in 1976 and continued until the relocation of the pail line in the winter of 1977-1978. From the face of the complaint, the Court is unable to determine whether the discriminatory layoffs of any of the named plaintiffs occurred prior to September 27, 1976. The defendant, as the moving party, has the burden of proving that the statute of limitations bars this action, and defendant has failed to come forward with evidence to support its contention.[1]

* * *

[The Court here addressed an unrelated motion]

An appropriate Order will be issued.

/s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

Date: 12/15/83

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[1] The Court has reviewed a pending motion for class certification and found the proposed class poorly defined. The Court recognizes that the issue of when the statute of limitations begins to run may need to be addressed in setting the temporal limitations of any class which may be certified subsequently.